UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Lindon B. CARMIENKE 140 42 6230

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2474

Lindon B. CARMIENKE

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By order dated 4 September 1987, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended outright Appellant's Merchant Mariner's License and Document for one month, and further suspended them for an additional two months under probationary terms for six months following the termination of the outright suspension. This order was issued upon finding proved a charge of misconduct and a charge of negligence. Each charge was supported by one specification. The misconduct charge was initially supported by two specifications. The first specification was withdrawn at the hearing. The misconduct charge and specification found proved that Appellant, while serving as the operator of thetug ORION, under the authority of the captioned license and document, on or about 27 February 1987, failed to maintain a proper lookout by sight and hearing as required by Rule 5 of the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS '72), 33 U.S.C. foll. 1602, which contributed to the collision of the barge USL-501, while under the tow of the tug ORION, with the M/V UNITED PEACE in the Gulf of Mexico in the vicinity of the Sabine Pass Sea Buoy. The negligence charge and specification found proved that Appellant, while acting as the operator on board the tug ORION, under the authority of the captioned license and document, on or about 27 February 1987, failed to take early and substantial action to avoid a collision with the M/V UNITED PEACE, as required by Rule 8(a) and 8(c) of the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS '72), 33 U.S.C. foll. 1602. This contributed to the collision of the barge USL-501, while under the tow of the tug ORION, with the M/V UNITED PEACE in the Gulf of Mexico in the vicinity of the Sabine Pass Sea Buoy at or about 1117 hours.

The hearing was held at Port Arthur, Texas, on 14 and 15 April and 12 May 1987.

Appellant appeared at the hearing and was represented by lawyer counsel. Appellant entered, in accordance with 46 CFR 5.527(a), an answer of deny to each charge and specification.

The Investigating Officer introduced in evidence eleven exhibits and called two witnesses.

Appellant introduced eleven exhibits into evidence and called one witness. Appellant testified in his own behalf. Appellant submitted a post hearing brief on 1 June 1987.

The first specification supporting the charge of misconduct was dismissed. The Administrative Law Judge concluded as a matter of law that each remaining charge and supporting specification was found proved by substantial evidence of a reliable and probative nature.

The complete Decision and Order was dated 4 September 1987 and was served on Appellant on 14 September 1987. Appeal was timely filed and considered perfected on 13 November 1987. Appellant submitted a motion requesting an oral hearing on appeal. This motion was denied by the Chief Counsel on 30 December 1987. Appellant, then, filed a petition to re-open the hearing on 25 January 1988. This petition was denied by the Chief Counsel on 28 April 1988. Appellant's appeal is now properly before me for review.

FINDINGS OF FACT

At all times relevant, Appellant was the holder of Coast Guard Merchant Mariner's License No. 57331 and Merchant Mariner's Document No. 140 42 6230. Appellant's license authorized him to serve as an operator navigating uninspected towing vessels upon oceans not more than 200 miles offshore and upon inland waters of the United States. Appellant's document qualified him to sail as able seaman (special) and wiper.

On or about 27 February 1987, Appellant, while acting under the authority of the captioned license and document, on board the tug ORION, which was pushing in the notch its integrated barge, USL-501, was the operator and navigator of the tug ORION at the time of the collision with the M/V UNITED PEACE in the Gulf of Mexico in the vicinity of Sabine Pass Sea Buoy. Appellant relieved the watch as

operator on the tug ORION at or about 1050 on 27 February 1987. Appellant was aware that the M/V UNITED PEACE was proceeding ahead of the tow inbound towards the ports of Port Arthur and Beaumont, Texas.

The tug ORION is constructed with a permanent elevated wheel house connected to the lower wheel house by an elevator at the rear of the wheel house. This elevator shaft obstructs the all-round view from the steering station in the elevated wheel house. Appellant was alone in the elevated wheel house of the tug ORION for several minutes prior to the collision.

The visibility on 27 February 1988 prior to the collision was restricted by dense fog to 600-800 feet. Appellant did not have anyone acting as lookout at the time of the collision. The vessel traffic in and around the Sabine Pass Sea Buoy at the approximate time of the collision was somewhat dense. The tug ORION with the barge USL-500, the M/V UNITED PEACE, and the pilot boat, were in the general area of the buoy. The outbound M/V TEXACO MONTANA passed the M/V UNITED PEACE and the tug ORION at some time prior to the collision.

On or about 27 February 1987, Appellant, whil acting under the authority of the captioned license and document, on board the tug ORION, which was pushing in the notch its integrated barge, USL-501, did not attempt to alter course or slow down in sufficient time to avoid the collision with the M/V UNITED PEACE in the Gulf of Mexico in the vicinity of Sabine Pass Sea Buoy.

At the time of the subject collision, the tug ORION and its integrated barge were approaching the M/V UNITED PEACE near the Sabine Pass Sea Buoy. The port bow of the integrated barge, USL-501, collided with the starboard side, amidships, of the M/V UNITED PEACE. The collision occurred in international waters governed by the International Regulations for the Prevention of Collisions at Sea (COLREGS '72) codified at 33 U.S.C. foll. 1602.

While the tug ORION was pushing the barge USL-500 in the notch, Appellant, operating from the elevated wheel house, was located approximately 400 feet aft of the bow of the barge USL-500. During the moments when Appellant was alone on the bridge, in addition to acting as lookout, he was busy observing the radar, acting as helmsman, and navigating the tug ORION. Appellant had known for at least twenty minutes prior to the collision that the M/V UNITED PEACE was off his port side about one and a half nautical miles away in dense fog. Appellant observed by radar that the distance between himself and the M/V UNITED PEACE was decreasing.

Appellant did not alter course or reduce speed for twenty-five minutes prior to the moment he saw the bow of the

vessel emerge from the fog some 600-800 feet away. Fully aware that he was operating in reduced visibility, Appellant did not attempt to contact the M/V UNITED PEACE by radio.

Appellant was not sounding any fog signals at the time of the collision or immediately prior thereto. The oiler on the tug ORION, who was up on deck, testified that he heard no fog signals. The pilot of the M/V UNITED PEACE heard only the set of fog signals from the M/V UNITED PEACE prior to boarding the M/V UNITED PEACE from the pilot boat. The pilot heard no fog signals from the tug ORION after he boarded the M/V UNITED PEACE, nor were any fog signals reported to him by bridge personnel. The Master of the M/V UNITED PEACE did not hear any fog signals from the tug ORION.

The Administrative Law Judge's Finding of Fact No. 8 erroneously states that the length of the tug ORION is 195 feet. The length of the tug ORION is 141.5 feet.

BASES OF APPEAL

Appellant raises the following issues on appeal:

(1) Appellant argues that the proper standard of proof in suspension and revocation hearings should be more than a mere preponderance of evidence, but less than the reasonable doubt standard.

() Appellant argues that causation must be proved in order to sustain a finding of proved of a charge and specification that asserts causation, when causation is not a normal element of the specification.

(3) The Administrative Law Judge's findings of fact and conclusions of law relating to the specification alleging Appellant's failure to maintain a lookout are not supported in the record, are inherently incredible, and should be reversed.

(4) The Administrative Law Judge's findings of fact and conclusions of law relating to the negligence charge and the specification alleging failure to take early and substantial action to remain clear of the UNITED PEACE are inherently incredible and should be reversed.

(5) The actions/omissions of the M/V UNITED PEACE caused the collision.

(6) The Administrative Law Judge's finding that the tug ORION was not sounding fog signals is inherently incredible and should be reversed.

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OPINION

I

Appellant argues that the proper standard of proof in suspension and revocation proceedings is more than a mere preponderance of the evidence and less than reasonable doubt. He states that no court has yet attempted to define this standard. (Appellant's brief at pp. 4, 5).

Appellant has incorrectly stated the proper standard of proof to be applied in Coast Guard suspension and revocation proceedings. The Investigating Officer must prove the charges and specifications by a preponderance of the evidence. The proper standard of proof for a hearing convened pursuant to 46 U.S.C. 7703 is set forth at 46 CFR 5.63:

> "In proceedings conducted pursuant to this part, findings must be supported by and in accordance with the reliable, probative, and substantial evidence. By this is meant evidence of such probative value as a reasonable, prudent, and responsible person is accustomed to rely upon when making decisions in important matters."

The Supreme Court holding in Steadman v. SEC, 450 U.S. 91, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981), which examined the issue of which standard of proof should be applied in administrative hearings governed by the Administrative Procedure Act, is directly applicable in these proceedings. Congess has specifically made the provisions of the Administrative Procedure Act, including 5 U .S.C. 556(d), applicable to suspension and revocation proceedings. See 46 U.S.C. 7702. In reviewing the language in 5 U.S.C. 556(d) and the

legislative history of the Administrative Procedure Act, the Supreme Court, in Steadman, supra, found that it was the intent of Congress to establish a preponderance standard in administrative hearings to ensure due process. The regulation in question, 46 CFR 5.63, was revised in 1985 to reflect the holding in Steadman, and tracks the language of 5 U.S.C. 556(d). See Comments on Final Rule, 50 Fed. Reg. 32179 (August 9, 1985).

II

Appellant argues that once having pleaded that both failing to maintain a proper lookout and failing to take early and substantial action to avoid collision contributed to the collision, the Coast Guard must prove these causal links in order to prove the charges and specifications. I disagree.

Suspension and revocation proceedings are intended to be remedial in nature. They fix neither criminal nor civil liability. These proceedings are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea. See 46 CFR 5.5. Administrative pleadings in these matters are not rigidly bound by the procedural rules governing criminal and civil trials. Kuhn v. CAB, 183 F.2d 839 (D.C. Cir. 1950). "It is sufficient if the [Appellant] 'understood the issue' and 'was afforded full opportunity' to justify [hi] conduct. Citizens State Bank of Marshfield, MO v. FDIC, 752 F.2d 209 (8th Cir. 1984); NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938); Aloha Airlines v. CAB, 598 F.2d 250 (D.C. Cir. 1979).

A specification in a suspension and revocation proceeding sets forth the facts which form the basis of a charge and enables the Appellant to identify the act or offense so that a defense can be prepared. This definition is found at 46 CFR 5.25, which requires that each specification shall state:

(a) [A] basis for jurisdiction;

(b) [The] date and place of [the] act or offense; and

(c) The facts constituting the alleged act or offense.

A specification supporting a charge of misconduct must adhere to the guidelines set forth in 46 CFR 5.27, as follows:

"Misconduct is human behavior which violates some formal, duly

established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required."

Likewise, a specification supporting a charge of neglgence must adhere to 46 CFR 5.29, as follows:

"Negligence is the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform."

The assertion in each specification that Appellant's actions contributed to the collision is not a necessary element to support a finding of proved, but rather an aggravating circumstance. In Appeal Decision 2415 (MARSHBURN), I concluded:

"It is not, however, improper to allege and prove the consequence of a negligent act. The consequence, such as a collision or an allision, though unnecessary to support a decision finding negligence, may be an aggravating factor, or the lack thereof may be a mitigating factor, and hence it may be proved whether or not it is alleged. See Appeal Decision 2129 (RENFRO)."

Failure to prove such an aggravating circumstance does not render the specification defective, nor does it create a defense to the charge and specification. Cf. Appeal Decision 2319 (PAVELEC).

III

Appellant contends that the Administrative Law Judge's findings of fact and conclusions of la with respect to the misconduct specification alleging failure to maintain a proper lookout as required by Rule 5 of the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS '72), 33 U.S.C. foll. 1602, are not supported by reliable, probative, and substantial evidence, and therefore are inherently incredible and should be reversed.

A

Appellant argues that under the circumstances of this case, as watch officer or helmsman, he could properly serve as lookout. I

disagree.

Rule 5 of the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS '72), 33 U.S.C. foll. 1602, requires that:

"Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all means appropriate in the prevailing circumstances and conditions so as to make full appraisal of the situation and of the risk of collision."

The adequacy of a lookout on board a vessel underway is a question of fact to be determined in light of the existing facts and circumstances. The Administrative Law Judge was in the best position to determine whether the facts and circumstances of the case permitted Appellant to serve as a proper lookout. See Appeal Decision 2421 (RADER); Appeal Decision 2319 (PAVELEC). See also Appeal Decision 2390 (PURSER) and Appeal Decision 2046 (HARDEN).

Appellant testified that the Master of the tug ORION was acting as his lookout as they made their approach to the Sabine Pass Sea Buoy. (Transcript, Vol. III at p. 460). Appellant explained that it was the Master's policy to have an additional licensed individual in the pilot house as a lookout in restricted areas. (Transcript, Vol. III at p. 460). When the Master left the bridge minutes before the collision, Appellant was alone in the pilot house with no additional lookout assigned on the forecastle of the barge. (Transcript, Vol. I at p. 137; Vol. II at p. 186; Vol. IV at p. 487). Appellant testified that an additional lookout may have been able to hear fog signals that Appellant could not hear in the pilot house. (Transcript, Vol. IV at p. 509). He also testified that an additional lookout, positioned on the forecastle of the barge, would not have seen the M/V UNITED PEACE, which was located off Appellant's port side forward of the beam, before the Appellant saw it. (Transcript, Vol. IV at pp. 509-511).

However, during the moments when Appellant was alone on the bridge, in addition to acting as lookout, he was busy observing the radar, acting as helmsman, and allegedly sounding fog signals according to his testimony. (Transcript, Vol. III at p. 466). Appellant had known for at least twenty minutes prior to the collision that the M/V UNITED PEACE was off his port side about one and a half nautical miles away in dense fog with visibility of 600-800 feet. (Transcript, Vol. I at pp. 109-117; Vol. II at pp. 206-212, 224; Vol. III at pp. 452-454, 462-470; Vol. IV at pp. 517-519). Appellant had informed the Master of the tug ORION that the vessel later determined to be the M/V UNITED PEACE had slowed down in the vicinty of the

Sabine Pass Sea Buoy shortly before the collision. (Transcript, Vol. II at p. 224). Appellant testified that during the time the Master had left the bridge he observed by radar that the M/V UNITED PEACE was still off his port side, but the range had decreased to about half a nautical mile. (Transcript, Vol. II at pp. 468-470). Given the restricted visibility and the density of the traffic, a prudent mariner would have assigned an additional lookout, who would have been able to give his full attention to the developing situation.

Appellant points out that the Congressional intent, as expressed in Senate Report 96-979, which accompanies Rule 5, is to permit the watch officer or helmsman to serve as the sole lookout under certain circumstances. However, the report states in pertinent part:

On vessels where there is an unobstructed all-round view provided at the steering station, as on certain pleasure craft, fishing boats, and towing vessels, or where there is no impairment of night vision or other impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as the lookout. However, it is expected that this practice will only be followed after the situation has been carefully assessed on each occasion, and it has been clearly established that it is prudent to do so. Full account shall be taken of all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density, and proximity of navigational hazards. It is not the intent of these rules to require additional personnel forward, if none is required to enhance safety. S. Rep. No. 979, 96th Cong., 2d Sess. 7-8 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 768, 7075. (Emphasis supplied).

The Administrative Law Judge was aware of the Senate Report, supra, and addressed the factors that supported his conclusion that under the circumstances a lookout other than the Appellant was required to enhance safety. (Decision & Order, p. 30). The Administrative Law Judge's findings concerning Appellant's failure to maintain a proper lookout as required by Rule 5 are supported by reliable, probative, and substantial evidence and will not be disturbed on appeal. (Decision & Order, pp. 16-20). See 46 CFR 5.63; Cf. Appeal Decision 2468 (LEWIN); Appeal Decision 2420 (LENTZ); Appeal Decision 2421 (RADER); Appeal Decision 1758 (BROUSSARD).

B

Appellant argues the Administrative Law Judge's finding that Appellant's all-round view from the elevated wheel house of the tug

ORION was obstructed due to the location of the elevator shaft was erroneous. I disagree.

Appellant was operating the tug ORION from a fixed elevated wheel house, which is entered from the lower wheel house via an elevator. This elevator is constructed at the rear of the elevated wheel house. The Master of the tug ORION testified that there were no windows in the elevator shaft and that he thought h e could "lean" far enough at the steering station to see out a window adjacent to the shaft. (Transcript, Vol. I at pp. 107-109). See also Respondent's Exhibits E and F (hotographs). This evidence supports the Administrative Law Judge's finding that the shaft obstructed the all-round view from the steering station on the tug ORION. The finding will not be reversed on appeal.

Appellant also argues that the Administrative Law Judge's finding concerning traffic density on the date of the collision was erroneous. Again, I disagree.

The Administrative Law Judge's Finding of Fact No. 28 states there were other vessels in the vicinity besides the tug ORION and the barge USL-5011, namely the M/V UNITED PEACE, the pilot boat, and the outbound TEXACO MONTANA, which had passed the M/V UNITED PEACE before the M/V UNITED PEACE boarded its pilot. (Decision & Order at p. 18). The finding of fact is supported by substantial evidence of a reliable and probative nature. (Transcript, Vol. I at pp. 116, 126; Vol. II at pp. 232, 233, 235; Vol. IV at p. 518; Vol. VII at pp. 48-49). The Administrative Law Judge stated in his opinion that this created a somewhat dense traffic area. (Emphasis added) (Decision & Order at p. 30).

Appellant highlights these points in an effort to justify his actions in light of the various factors in the Senate Report, discussed above, where the helmsman of a vessel may act as the sole lookout. The Administrative Law Judge considered these factors to determine if Appellant's situation met the necessary criteria. (Decision & Order at pp. 29-30). The Administrative Law Judge, in addition to the view from the pilot house of the tug ORIO, considered the traffic density as it existed, and also the most critical factor, the reduced visibility of 600-800 feet due to fog. (Decision & Order at pp. 29-30). Also, he considered the fact that this collision occurred in the vicinity of a sea buoy located in a safety fairway, which was the approximate position of a local pilot's association embarkation area. (Decision & Order at p. 30; Transcript, Vol. II at pp. 165, 169).

1 The Administrative Law Judge treated the configuration of the tow as two vessels for this purpose.

Congress explicitly provided that under certain circumstances the helmsman or watch officer may serve as the sole lookout, but only when it is prudent and safe to do so. The Administrative Law Judge's conclusion that it was not prudent for the Appellant to act as the sole lookout is amply supported by Appellant's testimony that he was so busy observing the radar, minding the helm, navigating the vessel, allegedly sounding fog signals, and attempting to act as lookout, that he had no time to use the ship's radio to contact the M/V UNITED PEACE prior to the collision. (Transcript, Vol. III at pp. 462, 466, 468, 469, 471; Vol. IV at p. 512). Furthermore, the attempt by Appellant to act as a proper lookout was a departure from the accepted policy of the ORION's Master of having an additional licensed individual as lookout in restricted areas. (Transcript, Vol. III at p. 460). It was neither prudent nor safe for the Appellant to attempt to act as a sole lookout in close proximity to anoher vessel in dense fog. In this case, the evidence proves that the circumstances prior to the collision clearly were not those intended by Congress to satisfy the criteria in the Senate Report, supra, where the helmsman may act as the sole lookout.

C

It is within the purview of the fact-finder, after hearing all the testimony and viewing the evidence, to determine findings. The Administrative Law Judge can only be reversed on these matters if his findings are arbitrary, capricious, clearly erroneous, and unsupported by law. Appeal Decision 2390 (PURSER); Appeal Decision 2363 (MANN); Appeal Decision 2356 (FOSTER); Appeal Decision 2344 (KOHAJDA); Appeal Decision 2340 (JAFFEE); Appeal Decision 2333 (AYALA). The Administrative Law Judge's finding that Appellant failed to maintain a proper lookout as required is supported by substantial evidence of a reliable and probative nature. (Decision & Order at pp. 23-26). Although not a necessary element of the specification, the aggravating circumstance that Appellant's failure to maintain a proper lookout contributed to the collision is also supported by substantial evidence of a reliable and probative nature. (Decision & Order at pp. 19-20, 26). In the moments prior to the collision, Appellant was busy performing many duties as the operator of the tug ORION and its barge. (Transcript, Vol. III at pp. 462, 466,

468, 469, 471; Vol. IV at p. 512). An independent lookout, whose sole duty would be to detect by sight or hearing the presence of other vessels, may have been able to alert Appellant in sufficient time to have avoied the collision. (Transcript, Vol. IV at p. 509).

IV

Appellant also argues that the Administrative Law Judge's findings of fact and conclusions of law with respect to the second charge and specification that Appellant negligently failed to take early and substantial action to remain clear of the M/V UNITED PEACE are inherently incredible. I disagree.

Appellant was aware of the close proximity of a vessel, later determined to be the M/V UNITED PEACE, and noted her position to be off his port side on a parallel northerly heading for thirty minutes prior to the collision. (Transcript, Vol. IV at pp. 518, 519). The record in this matter clearly proves that Appellant did not alter course or reduce speed for twenty-five minutes prior to the moment he saw the bow of the vessel emerge from the fog some 600-800 feet away. (Transcript, Vol. III at pp. 454, 457, 458, 467, 470). Yet, during this time, he observed on the radar that the distance between the vessels had closed from one and a half miles to a half a mile then down to two tenths of a mile. (Transcript, Vol. III at p. 470; Vol. IV at pp. 518, 528). Fully aware that he was operating in reduced visibility of 600-800 feet, Appellant did not attempt to contact the M/V UNITED PEACE by radio. (Transcript, Vol. IV at pp. 512, 513). Aware that prior attempts by the Master to contact this vessel by radio had not been successful, Appellant continued to maintain course and speed. (Transcript, Vol. III at pp. 464-466; Vol. IV at pp. 511, 512). Appellant did not sound any danger signal at any poit prior to the collision when the vessels came in sight of one another. (Transcript, Vol. III at pp. 347, 466-476; Vol. IV at pp. 602). Despite Appellant's observance of the radar, he failed to perceive that the two vessels had begun to converge on a collision course. (Transcript, Vol. IV at pp. 505). Appellant testified that he was busy with numerous tasks in the pilot house after the Master went below. These included observing the radar, minding the helm, navigating the vessel, allegedly sounding fog signals, and attempting to act as lookout. He testified he had no time to use the ship's radio to contact the M/V UNITED PEACE prior to the collision. (Transcript, Vol. III at pp. 462, 466, 468, 469, 471; Vol. IV at p. 512). Appellant failed to eliminate the risk of collision. Appellant testified that he could have altered his course to starboard to avoid the collision, that by pulsing his engine he could have achieved a

slower speed, and that he could have stopped his engine altogether. (Transcript, Vol. IV at pp. 482, 525, 526). Any of these actions, if taken by Appellant in a timely fashion, would have avoided a collision.

Rule 8 of the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), 33 U.S.C. foll. 1602, requires that:

"(a) Any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship."

...

"(c) If there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close-quarters situation provided that it is made in good time, is substantial a nd does not result in another close quarters situation."

From a review of the record, it becomes clear in light of Rule 8(a) and 8(c) that the Administrative Law Judge's findings and conclusions that Appellant failed to take early and substantial action to avoid collision were supported by substantial evidence of a reliable and probative nature and will not be reversed on appeal. (Decision & Order, pp. 26-29).

V

Appellant argues that actions and omissions of the M/V UNITED PEACE caused the collision. Contributory negligence is not a defense in suspension and revocation proceedings pursuant to 46 U.S.C. 7701. These proceedings are remedial in nature. See 46 CFR 5.5. The only issue is whether Appellant's actions and omissions were negligent. See Appeal Decision 2415 (MARSHBURN); Appeal Decision 2380 (HALL); Appeal Decision 2175 (RIVERA); Appeal Decision 2096 (TAYLOR/WOODS); and Appeal Decision 1670 (MILLER).

VI

Appellant argues that the Administrative Law Judge's finding that the tug ORION was not sounding fog signals is inherently incredible. I disagree.

The Master of the tug ORION testified that fog signals on board the ORION could not be sounded automatically. Each signal had to be

manually sounded at the prescribed time. (Transcript, Vol. I at pp. 102-103). Appellant had gone on watch in the pilot house at approximately 1050. (Transcript, Vol. III at p. 451). Appellant testified that when he came on watch other persons in the pilot house were sounding fog signals. (Transcript, Vol. III at p. 459). Appellant testified that at about 1100, shortly before the collision, the visibility deteriorated to between 600-800 feet. (Transcript, Vol. III at pp. 459). Appellant was the only person on the bridge at the time of the collision. (Transcript, Vol. I at p. 137). The Master had gone below minutes prior to the collision. (Transcript, Vol. II at p. 145). Appellant testified that he sounded some fog signals at some point when he was on watch. (Transcript, Vol. III at pp. 459, 461, 467). However, the oiler on the tug ORION, who was up on deck, testified that he heard no fog signals. (Transcript, Vol. IV at pp. 601, 602).

The pilot of the M/V UNITED PEACE testified that the only set of fog signals he could hear from the pilot boat prior to boarding the M/V UNITED PEACE were those emanating from the M/V UNITED PEACE. (Transcript, Vol. II at p. 252; Vol. III at p. 347). The pilot further testified that he heard no fog signals from the tug ORION after he boarded the M/V UNITED PEACE, nor were any fog signals reported to him by bridge personnel. (Transcript, Vol. III at pp. 356, 357). The Master of the M/V UNITED PEACE was deposed in a reated civil action, and the Administrative Law Judge admitted his deposition into evidence. The Master stated that he did not hear any fog signals from the tug ORION. (Transcript, Vol. VII at p. 67; Resp. Exhibit J).

Appellant in his brief on page 50 states that neither the pilot nor the Master of the M/V UNITED PEACE left the pilot house. However, the Master stated that the starboard door was open in the pilot house and that he watched the bow of the barge USL-501 as it emerged from the fog and did not hear any fog signals. (Transcript, Vol. VII at pp. 62, 67; Resp. Exhibit J).

Appellant's testimony was contradicted by several witnesses. Where there is conflicting testimony it is the function of the Administrative Law Judge, as fact-finder, to evaluate the credibility of witnesses and resolve inconsistencies in the evidence. See Charles A. Grahn, Respondent, 3 N.T.S.B. 214 (Order EA-76, 1977); Appeal Decisions 2424 (CAVANAUGH), 2386 (LOUVIERE), 2340 (JAFFEE), 2333 (AYALA), 2302 (FRAPPIER), 2116 (BAGGETT), and 2460 (REED).

The premise that it is exclusively within the province of the

fact-finder to weigh the credibility of witnesses is well accepted. See United States v. Oregon State Medical Soc., 343 U.S. 326, 72 S. Ct. 690, 96 L. Ed. 978 (1952); Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819 (1933); Chesapeake & O R. Co. v. Martin, 283 U.S. 209, 51 S. Ct. 453, 75 L. Ed. 983 (1931); United States v. Caldwell, 820 F.2d 1395 (5th Cir. 1987); United States v. Bales, 83 F.2d 1289 (4th Cir. 1987); Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984).

Furthermore, an appellate reviewing body should not substitute its own determination of credibility for that of the fact finder. See Martin v. American Petrofina Inc., 779 F.2d 250 (5th Cir. 1985); Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985); Government of Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974), cert. denied 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975); Wilkin v. Sunbeam Corp., 466 F.2d 714, 717 (10th Cir. 1972), cert. denied, 409 U.S. 1126 (1973).

The underlying rationale for these rules is that the fact-finder can be influenced by the witness's demeanor, his tone of voice, his body language, and other matters that are not captured within the pages of a cold appellate record. See Charles A. Grahn, Respondent, 3 N.T.S.B. 214 (Order EA-76, 1977); Reagan v. United States, 157 U.S. 301, 15 S.Ct. 610, 39 L.Ed. 709 (1895); Government of Virgin Islands v. Gereau, 502 F.2d 914 (3rd Cir. 1974), cert. denied 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975).

The fact-finder can also balance the bias or interest of a witness in determining credibility. Herein, Appellant's license, his source of livelihood, was at stake. The Administrative Law Judge could correctly consider this interest, and similar interests or bias of the other witnesses in determining credibility. Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401, 19 S.Ct. 233, 43 L.Ed. 492 (1899); Reagan v. United States, 157 U.S. 301, 15 S.Ct. 610, 39 L.Ed. 709 1895).

It is obvious from a review of the record in the hearing below that Appellant's testimony that he was sounding fog signals was contradicted by several witnesses. Thus, in light of the rules concerning credibility of witnesses, the finding that Appellant was not sounding any fog signals is supported by substantial evidence of a reliable and probative nature and will not be reversed on appeal.

CONCLUSION

Having reviewed the entire record, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision and order of the Administrative Law Judge dated 4 September 1987, at Houston, Texas is AFFIRMED.

CLYDE LUSK, JR.
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 10th day of November, l988.

***** END OF DECISION NO. 2474 *****